

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

The New PJM Companies	Docket Nos.	ER03-262-009
American Electric Power Service Corp.		ER03-262-008
On behalf of its operating companies		ER03-262-007
Appalachian Power Company		
Indiana Michigan Power Company		
Kentucky Power Company		
Kingsport Power Company		
Ohio Power Company, and		
Wheeling Power Company		
Commonwealth Edison Company, and		
Commonwealth Edison Company of Indiana, Inc.		
The Dayton Power and Light Company, and		
PJM Interconnection, LLC		
American Electric Power Company		EC98-40-000
and		ER98-2770-000
Central and South West Corporation		ER98-2786-000

**REQUEST OF THE INDIANA UTILITY REGULATORY COMMISSION, THE NEW  
JERSEY BOARD OF PUBLIC UTILITIES AND THE DISTRICT OF COLUMBIA  
PUBLIC SERVICE COMMISSION FOR LEAVE TO INTERVENE OUT OF TIME IN  
SUPPORT OF THE FEDERAL ENERGY REGULATORY COMMISSION  
AND REQUEST FOR WAIVER OF THE SERVICE LIST REQUIREMENTS**

**STATEMENTS IN SUPPORT OF GRANTING LATE INTERVENTION BY THE  
ILLINOIS COMMERCE COMMISSION, THE MARYLAND PUBLIC SERVICE  
COMMISSION, THE MICHIGAN PUBLIC SERVICE COMMISSION, AND THE  
PENNSYLVANIA PUBLIC UTILITIES COMMISSION,**

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 CFR 385.214, and due to compelling and immediate interests of the District of Columbia Public Service Commission (“DCPSC”) and State Commissions in the Mid-Atlantic and Midwest, the New Jersey Board of Public Utilities (“NJBPU”), the District of Columbia Public Service Commission, and the Indiana Utility Regulatory Commission (“IURC”) (collectively “the Intervening State Commissions”); respectfully request leave to intervene in the ER03-262 Dockets. This request for intervention is

supported by the Illinois Commerce Commission, the Maryland Public Service Commission<sup>1</sup>, the Michigan Public Service Commission and the Pennsylvania Public Utilities Commission<sup>2</sup>.

The Intervening State Commissions submit this filing so that the record of this matter reflects each State Commission's support of the direction and actions of the Federal Energy Regulatory Commission. In support of the motion to intervene, the Intervening State Commissions understand that should they be granted status as intervenors they must accept and be bound by the record of this matter as it exists at this time.

1. The Intervening State Commissions and those State Commissions that support the granting of late intervention together represent Commissions that regulate the terms and conditions of electric utility service in the Midwest and Mid-Atlantic having a combined population in excess of 55 million people. These Intervening State Commissions have participated in the ongoing FERC process of reforming the electric utility marketplace nationally and have undertaken local reforms in accordance with the wills expressed by the legislatures of the states in which they regulate. As agencies of states, they are not able to address matters of interstate commerce adequately, in order to improve regional reliability, nor can they enforce their decisions across the regional grid without the active support of the FERC.

2. The Intervening State Commissions supports the Commission's *Order Making Preliminary Findings and Giving Public Notice and Setting the Matter for Public Hearing Under PURPA Section 205(A)*, issued on November 25, 2003 ("Order"). Indiana supports the FERC's actions because of a compelling and immediate interest in having American Electric Power Company ("AEP") and its operating company serving their state join a Regional Transmission Organization ("RTO") without further delay. Additionally, the Illinois Commission supports the Order because of its immediate concern that Commonwealth Edison's effective integration into the PJM L.L.C. ("PJM") is hampered by AEP's lack of participation in an RTO. The Michigan and Pennsylvania Commissions have also expressed their interest through those Commission's interventions. Finally, the New Jersey Board and the D.C. Commission have compelling reliability and commercial interests that necessitate their participation in this matter.

3. For Indiana, AEP's failure to date to participate in an RTO constitutes probable cause to believe that AEP has violated specific orders it has previously issued. In addition to orders

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<sup>1</sup> The Maryland Public Service Commission has already intervened in this Docket and wishes herein only to state its position that the request for late intervention by the District of Columbia Public Service Commission, the Indiana Utility Regulatory Commission, and the New Jersey Board of Public Utilities should be granted. The Maryland Commission takes no position on any other position advanced by the instant pleading.

<sup>2</sup> On March 14, 2003, the Michigan Public Service Commission, the Public Utilities Commission of Ohio and the Pennsylvania Public Utility Commission filed joint comments in the instant proceedings which encouraged the Commission to move forward on AEP's integration into an established RTO. Since the Michigan and Pennsylvania Commissions are already a party to this proceeding, they are not joining this intervention request. However, the Michigan and Pennsylvania Commissions support this request for late intervention by the Indiana Utility Regulatory Commission. FERC has granted a number of late interventions in this proceeding, including those of several state commissions, most recently on January 7, 2004. The Michigan and Pennsylvania Commissions believe that the input of all state commissions will assist to the Commission in making its decision in this proceeding.

concerning the transfer of functional control of assets to an RTO,<sup>3</sup> AEP's failure to participate in an RTO may also breach Settlement Agreements previously entered into in connection with AEP's merger with Central & South West Corporation ("CSW").<sup>4</sup> Specifically, the Indiana Commission agreed not to oppose AEP's merger with CSW at the Securities & Exchange Commission ("SEC") by invoking provisions of the Public Utility Holding Company Act ("PUHCA").<sup>5</sup> The Settlement Agreement, in part, was conditioned on AEP's commitment to participate in an RTO. That commitment was accepted as a means of mitigating AEP's market power and providing greater assurance that consumers would realize the economic and reliability benefits of AEP's merger commitments promised in the Settlement Agreement.

4. For Illinois, AEP's noncompliance in joining an RTO has hindered the Illinois Commerce Commission's statutory obligations to ensure that Illinois electric utilities participate in an independent transmission system operator.<sup>6</sup> Further, AEP's absence from PJM limits the Illinois Commission's ability to carry out its statutory obligation to promote the development of competitive wholesale and retail energy markets that benefit all Illinois consumers.<sup>7</sup> Without AEP's full and immediate integration into the PJM, Illinois retail customers will be denied access to the full range of benefits of Commonwealth Edison's participation in PJM, including but not

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<sup>3</sup> See for example, Indiana Utility Regulatory Commission Cause No. 42350 In the Matter of the Commission's Investigation, Pursuant To IC § 8-1-2-58 Into The Status Of The Transfer Of Functional Control Of Transmission Facilities Located In Indiana, By Indiana Michigan Power Company, D/B/A American Electric Power, To A Regional Transmission Organization And For Commission Review Of The Transfer Pursuant To IC § 8-1-2-83 and consolidated with Cause No. 42352 In The Matter Of The Petition Of Indiana Michigan Power Company, D/B/A American Electric Power, For Approval, To The Extent Necessary, To Transfer Functional Control Of Transmission Facilities Located In Indiana To PJM Interconnection L.L.C. Pursuant To Ind. Code § 8-1-2-83, September 10, 2003. Specifically, Indiana Code § 8-1-2-83(a), states, *inter alia*, that: *No public utility, as defined in section 1 of this chapter, shall sell, assign, transfer, lease, or encumber its franchise, works, or system to any other person, partnership, limited liability company or corporation, without the approval of the commission after hearing.*

<sup>4</sup> The following State Commissions approved Settlement Agreements, approved the merger, or agreed to withdraw their opposition to the merger: Arkansas, Indiana, Kentucky, Louisiana, Michigan, Missouri, Ohio, Oklahoma, and Texas Commissions. States, such as Indiana, had Settlement Agreements with specific voluntary commitments from AEP to join an RTO. See for example, Indiana Utility Regulatory Commission Cause No. 41210 In the Matter of the Investigation of the Commission's Own Motion Into Any and All Matters Relating to the Merger of American Electric Power, Inc. and Central and South West Corporation, *Ind. Util. Reg. Comm'n*, April 26, 1999. This Order was affirmed by the Court of Appeals in an unpublished Opinion and transfer was denied by the Indiana Supreme Court. Among other things, the Settlement Agreement featured rate reductions in excess of \$60 million, a rate freeze over several years, and AEP's joining a Regional Transmission Organization.

<sup>5</sup> Section 10(c)(2) requires the Securities & Exchange Commission to disapprove an acquisition "unless" it finds, "affirmatively," *Electric Energy, Inc.*, 38 S.E.C. 658, 668 (1958), that the acquisition will "serve the public interest by tending toward the economical and efficient development of an integrated public-utility system." The Section 10(c)(2) review requirement can be separated into two components. *First*, the acquisition must lead to a "single integrated public utility system," as defined under Section 2(a)(29)(A). *Second*, it must enhance the physical operations of the integrated public-utility system, by making the system "more economical and efficient." On January 18, 2002, the United States Court of Appeals for the District of Columbia ruled that the SEC failed to adequately consider whether the AEP – CSW merger complied with these provisions of the Public Utility Holding Company Act (PUHCA).

<sup>6</sup> Ill. Rev. Stat. ch. 220, para. 16-126 (2003).

<sup>7</sup> Ill. Rev. Stat. ch. 220, para. 16-101(A) (2003)

limited to an unhampered, broad supply market, protections from serious gaming opportunities, improved regional coordination and reliability, optimal utilization of generation and transmission facilities, and regional planning for transmission upgrades.

5. AEP's failure to participate in an RTO uniquely impacts Illinois due to the fact that the so-called "seam" between PJM and the Midwest Independent Transmission System Operator ("MISO") cuts through the heart of the State. The Illinois Commission, in various forums, has strongly supported the FERC's efforts to develop regional, competitive wholesale power markets and a joint and common market between PJM and MISO. Without a fully functioning joint and common market for the Midwest, it will be difficult to bring the benefits of retail competition to Illinois electricity consumers given the configuration of the two RTOs. The continued sustainability of the competitive retail market in Illinois is in question as long as AEP fails to cooperate in developing the Midwest market.

6. The Intervening State Commissions are cognizant of AEP's claim that if it joined an RTO it may violate recently adopted Virginia law or preliminary directives of the Kentucky Commission. However, by failing to join an RTO in prior years, when the Virginia Law and the Kentucky Commission preliminary directives did not exist, after having made the commitment promptly to do so, there now exists probable cause to conclude that AEP has already failed to act in accordance with lawful orders of the Indiana Commission. The time to comply with *those* lawful orders has long since passed. In the interim, a major blackout occurred this past August. Given AEP's location and prominence on the grid, had it fully complied before then with its commitments, consequent greater communication and control by PJM and MISO might well have averted the August blackout and the substantial economic losses occasioned thereby.

7. Over the past decade, AEP has repeatedly invoked its need to comply with some states' orders to limit or prevent orders of other states. The net result of this process has been AEP's continued independence of any RTO and an RTO system in the Midwest that functions less efficiently. By remaining outside an RTO, AEP has retained the opportunity to capture greater profits by charging pancaked transmission rates, thereby generating revenue in excess of what AEP would be permitted to charge if it were subject to an RTO tariff in an environment where seams issues had been resolved, and enjoys undue market power to the detriment of the regional market.

8. The Intervening State Commissions firmly believes that FERC should avoid where possible actions that might be characterized as preempting orders of the Virginia and Kentucky Commissions regarding AEP's participation in the PJM. However, in this case, the Intervening State Commissions just as firmly believes that any *final* orders of the Virginia and Kentucky Commissions that would prevent AEP from joining an RTO effectively preempts any other State Commission from lawfully enforcing its own previously-issued orders, implementing their own unique statutory duties such as compromising the Illinois Commission's ability to implement its statutory duties, and would thus adversely affect the reliability and economic efficiency of the PJM markets and much of the Eastern Interconnection. The result at present is that the Intervening State Commissions' efforts to enhance interstate commerce are impaired, their common desire to improve regional reliability is frustrated, and the benefits of the Settlement Agreements that AEP committed to provide to its customers in Indiana are not being realized.

9. With respect to the most recent "federalism" controversy, AEP could have, of its own volition, avoided the problem by agreeing to have its operating companies in states that have approved its participation in an RTO do so, while allowing states like Kentucky and Virginia to give due consideration to AEP's participation in PJM. This option is still available and worthy of consideration. It seems likely, after all, that "AEP East" (including operating companies in

Indiana, Kentucky, Michigan, Ohio, Virginia, Tennessee, and West Virginia) and “AEP West” will be operating in two or three different RTOs regardless of the approach used, since RTO borders do not conform to the borders of individual companies.

10. The Intervening State Commissions are not satisfied by AEP’s recent proposal to transfer functional control of portions of its transmission system to PJM without participation in the PJM marketplace. This proposal continues to leave Commonwealth Edison as an island, and does not bring the Midwest any closer to a coordinated, regional approach to wholesale power markets. AEP’s solution simply allows the problems already identified herein to persist, and the Intervening State Commissions are concerned that other utilities and states may begin to retreat from the competitive wholesale power market paradigm.

11. The Intervening State Commissions also urges the FERC to consider other enforcement actions to encourage AEP to achieve the desired objectives. Specifically, revocation of market-based rate authority, imposing structural requirements to prevent AEP from exercising market power, and ordering the unwinding of AEP’s merger with CSW are three enforcement actions that merit consideration. While the Intervening State Commissions appreciates that the deconstruction of AEP/CSW is an extreme measure, the fact is that there remains a lack of full electrical integration between AEP and CSW, required by the PUHCA. AEP’s participation in an RTO is the missing element which might reduce AEP’s market power and improve regional reliability as was contemplated at the time AEP and CSW were allowed to merge.

12. The Intervening State Commissions fully understands that the compelling economic and reliability issues in this matter are regional and multi-regional in scope and thus require regional and multi-regional solutions that no individual state commission can adequately resolve. The scope of the August blackout underscores the need for broad regional and multi-regional solution and frames the reality that AEP’s continued delay comes at a cost in terms of regional reliability. Had AEP been integrated into the PJM, the number of control areas and the number of communications required to effectuate reliability, factors that the Department of Energy cited as contributing to the blackout of August 14, 2003, would have been reduced. AEP’s central role in the Midwest’s solution is most recently confirmed by the expressed sentiment of many stakeholders in the MISO that the lack of a comprehensive joint operating agreement among AEP, PJM and the MISO will substantially reduce the effectiveness of the recently filed "Joint Operating Agreement" between the MISO and the PJM.<sup>8</sup> The MISO and PJM market monitors have a similar view, springing from their concerns regarding AEP’s present market power<sup>9</sup> The

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<sup>8</sup> Midwest Independent Transmission System Operator, Inc., and PJM Interconnection, L.L.C., Docket No. ER04-375-000, Filed December 31, 2003, Page 32. *"Many of the Midwest ISO stakeholders believe that AEP should be required to participate in the market to non market Phase 1 requirements of the JOA in order to adequately "hold harmless" Michigan and Wisconsin companies. At a minimum, the Midwest ISO's stakeholders believe that AEP should be ordered to participate in all reliability coordination items (including AFC coordination), as if AEP were a signatory to the JOA. They emphasize that AEP should be ordered to participate in the outage coordination requirements of Article VII, and that AEP flowgates be included in the reciprocal requirements of Article VI, with an obligation to redispatch AEP generation to relieve congestion on those flowgates when necessary".*

<sup>9</sup> Midwest ISO, Docket No. EL03-35-000, Market Monitors' Assessment of RTO Seams Issues in the Midwest, September 10, 2003: *"An additional seams issue is created by the fact that AEP has not yet joined an RTO. AEP lies between MISO and PJM and will create an ongoing market to non-market seam for PJM and for both the MISO and PJM after MISO implements markets. These seams will be prone to all the inefficiencies and associated gaming opportunities identified above. The interface pricing issue identified by PJM in July 2002 is one example of the inefficiencies and games that result from this*

FERC's action to compel AEP to abide by its voluntary commitments to join an RTO and to assist the Intervening State Commissions in enforcing their orders and statutes recognizes that the broader public interest must take precedence over the narrow vested interest of AEP or any other individual company's business plan.

13. The Intervening State Commissions understands that the FERC's application of the Public Utility Regulatory Policies Act ("PURPA") to require AEP to honor its longstanding voluntary merger commitments is an extraordinary action arising from extreme circumstances involving repeated delays, and is not a sea change in generally applicable policies respectful of comity. In this instance, because of the market problems these delays have created, the Intervening State Commissions supports FERC's statements and actions (e.g., support for the Organization of MISO States) that support cooperative federalism.

WHEREFORE the District of Columbia Public Service Commission, the New Jersey Board of Public Utilities and the Indiana Utility Regulatory Commission respectfully seek the Commission's approval to intervene out of time and to be exempted from complying with the Service List requirements.

DATED this 23rd day of January, 2004.

The filer of this document certifies that he has been authorized to file this pleading on behalf of the State Commissions listed in the first paragraph hereof.

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Indiana Utility Regulatory Commission

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Correspondence and communications concerning this matter should also be directed to:

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*interface. In addition, the inefficiencies associated with managing congestion at the interface between PJM and AEP continue to require the management of constraints via TLRs rather than redispatch and to create associated issues for PJM. ...*" Pages 9 and 10, July 28, 2003.